IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL D. JUDY Plaintiff, v. PREFERRED COMMUNICATION SYSTEMS, INC., a Delaware corporation, Defendant.	)	C.A. No. 4662-CC
MICHAEL D. JUDY Plaintiff, v. PREFERRED COMMUNICATION SYSTEMS, INC., a Delaware corporation, Defendant.	)	C.A. No. 4720-CC
MICHAEL D. JUDY Plaintiff, v. PREFERRED COMMUNICATION SYSTEMS, INC., and CHARLES M. AUSTIN, Defendants.	)	C.A. No. 4721-CC

BRIEF IN SUPPORT OF PLAINTIFF'S
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff Michael D. Judy ("Plaintiff" or "Judy") is a stockholder of Defendant Preferred Communication Systems, Inc. (the "Company" or "PCS"). Through these consolidated actions, Judy seeks to assert his fundamental rights as a stockholder of PCS. And, by obtaining the basic relief to which he is entitled, including inspection rights and an annual meeting, he hopes to set the Company on a course of action where it can operate and prosper under a qualified and competent board of directors. Currently, the Company is under the control of Defendant Charles M. Austin ("Austin"). Austin holds himself out as the sole officer, sole director, and single largest shareholder of the Company, and operates the Company as if it were a sole proprietorship. Austin, who has appeared *pro se* on behalf of himself and the Company, has no respect for the corporate form or the rights of stockholders other than himself.

Austin has refused Judy's request to inspect books and records of the Company, including documents evidencing the ownership of PCS. To Judy's knowledge, Austin has never caused the Company to hold an annual meeting of stockholders since the Company was formed in 1999. And, even more problematic, Austin has taken, and continues to take, action purportedly in the name of the Company without the authority to do so. The Company currently does not have a fully constituted board of directors. Since 2007, the Amended and Restated Certificate of Incorporation of the Company ("Certificate of Incorporation")[1] has mandated that the Company's board of directors (the "Board") consist of not less than four (4) directors and no more than nine (9). But no additional directors have been appointed or elected because the Company, under Austin's control, has never taken action to fill these seats.

[1] A true and correct copy of the Certificate of Incorporation is attached hereto as Ex. A to Walsh Aff.

Against this backdrop, the Company is facing a critical period in its corporate life. While one might assume that a corporate defendant which appears before this Court without counsel is lacking any significant value, PCS actually has substantial worth. By Austin's own admission, millions of dollars have been invested in PCS. The Company holds valuable licenses granted by the Federal Communications Commission (the "FCC"), which licenses, if properly managed, could allow the Company to develop into a credible player in the wireless telecommunications industry. But certain of its licenses have received unfavorable treatment from the FCC. That matter is now the subject of an appeal in federal district court. Relatedly, the FCC's Enforcement Bureau initiated its own proceedings before the FCC against Austin, the Company, and certain stockholders of the Company regarding actions taken, and representations made by, those parties before the FCC. Recently, to resolve that action, Austin caused the Company to enter into a settlement agreement with the FCC, which is under challenge. The chief administrative law judge has invited the parties to reach a new settlement or renew the proceedings, which were stayed pending settlement discussions. In either case, whether by settlement or full resolution of the proceedings, there is a substantial risk that certain or all of the Company's licenses will either be surrendered or revoked. The relief Judy seeks in this action will allow the Company to appoint a governing body that can act in the best interest of the Company and *all* of its stockholders.

NATURE AND STAGE OF PROCEEDINGS

Judy has filed three actions that have been consolidated for purposes of the hearing scheduled for September 29, 2009.

First, on June 12, 2009, Plaintiff filed a Verified Complaint Under 8 *Del. C.* § 220 (C.A. No. 4662) (the "220 Complaint"), seeking inspection of certain books and records of the Company. That action was initiated after Austin, on behalf of the Company, rejected Judy's written demand under oath to inspect books and records of the Company and its wholly-owned subsidiary, Preferred Acquisitions, Inc. ("PAI"). On July 18, 2009, Austin served an answer to the 220 Complaint (the "220 Answer").[2]

Second, on July 8, 2009, Plaintiff filed a Verified Complaint to compel the holding of an annual meeting of stockholders pursuant to 8 *Del. C.* § 211 (C.A. No. 4720-CC) (the "211 Complaint"). On August 14, 2009, Austin served an answer on behalf of the Company to the 211 Complaint ("211 Answer").

Third, also on July 8, 2009, Plaintiff filed a Verified Complaint For Declaratory And Injunctive Relief (C.A. No. 4721-CC) (the "Declaratory Judgment Complaint"). The Declaratory Judgment Complaint seeks declaratory relief relating to the proper composition of the Board of Directors and Austin's authority (or lack thereof) to take action on behalf of the Company. That complaint also asserts a second cause of action for breach of fiduciary duty against Austin; however, that cause of action is not before the Court on this motion. On August 10, 2009, Austin served an answer and counterclaims to the Declaratory Judgment Complaint

[2] Austin is acting *pro se* in his individual capacity as a defendant and also purports to speak for the Company. Counsel for Judy has urged Austin repeatedly to secure counsel for the Company (*see* Walsh Aff. ¶ 3), but to date he has not done so. Accordingly, the undersigned counsel have e-filed Austin's answers as a courtesy to Austin and the Court.

and counterclaims (the "Declaratory Judgment Answer"). On August 31, 2009, Judy moved to dismiss the counterclaims.

On July 28, 2009, the Court entered an order consolidating these action. A telephonic hearing on the relief sought in each of the three (3) actions (except for the breach of fiduciary duty claim) is set for September 29, 2009.

On September 9, 2009, Judy moved for summary judgment with respect to his 220 Complaint, 211 Complaint, and request for declaratory relief as to the composition of the Board. This is Judy's Opening Brief in support of that motion.

STATEMENT OF FACTS[3]

A. The Parties

1. Plaintiff

Judy is the record owner of at least 16,666 shares of Class A Common Stock, which shares represent his initial investment in the Company. (Declaratory Judgment Compl. ¶ 3; Declaratory Judgment Answer ¶ 17.)[4] He first became a stockholder of the Company on or about February 10, 1999 and, over time, has paid over $70,000 for his shares of capital stock in the Company. (Judy Aff. ¶¶ 1, 2.) Judy is also the President of Preferred Spectrum Investments, LLC ("PSI"), a group of 17 stockholders of the Company formed in 2009. (Judy Aff. ¶ 4.) Among other things, PSI was formed for the purpose of protecting the member stockholders' respective investments in the Company and preserving the interests of the Company generally. (*Id.*)

2. Defendants

a. The Company

The Company is a Delaware corporation that was incorporated on or about January 15, 1998. (*See* Ex. A to Walsh Aff., Certificate of Incorporation.) Through the ownership of telecommunications licenses, the Company is in the early stages of development to become a full service wireless telecommunications provider in key market areas across the

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[3] Reference is made to the (1) Transmittal Affidavit of Peter J. Walsh, Jr. and (2) Affidavit of Michael D. Judy, which are offered in support of Plaintiff's Consolidated Motion for Summary Judgment and are filed herewith. Citations to these affidavits will appear as "Walsh Aff. ¶ _" and "Judy Aff. ¶ _," respectively. In addition, reference is made to the affidavits of (1) Dr. Neil Alan Scott, (2) Linda Allen, (3) John G. Talcott, III, (4) Dorothea J. Talcott, (5) Lyle L. Wells, and (6) Paul Tucker, shareholders of the Company whose affidavits are offered in support of Plaintiff's Consolidated Motion for Summary Judgment. These affidavits will be cited collectively as "Stockholder Aff. ¶ _" and are filed herewith as Exhibit L to the Walsh Aff.

[4] Since this initial investment, Judy's total stock purchases in the Company have amassed to approximately 89,000 shares of capital stock of the Company. (Judy Aff. ¶ 2.) He holds stock certificates evidencing his ownership of all shares issued to him by the Company, except those shares that he owns pursuant to a two-for-one forward split of the Class A Common Stock. (Judy Aff. ¶ 3.)

United States and Puerto Rico. (Declaratory Judgment Compl. ¶ 4; Declaratory Judgment Answer ¶ 17.) Although in its developmental infancy and without a current source of revenue, the Company, given its potential, has been well-funded by investors. (*See* July Aff. ¶ 2.) By Austin's own admission, at least $40 million has been invested in the Company. (Declaratory Judgment Answer ¶ 63.)

b. Austin

Austin (together with the Company, the "Defendants") purports to own over 75% of the Company's voting stock. (Declaratory Judgment Answer ¶ 13.)[5] Austin claims to be the Company's sole officer (Declaratory Judgment Answer ¶ 58), holding the titles of President (Declaratory Judgment Answer ¶ 11) and CEO (Declaratory Judgment Answer ¶ 41). Austin also claims to be the Company's sole director. (Declaratory Judgment Answer ¶¶ 13, 17, 58.)

B. Background

1. The Certificate of Incorporation

Since its incorporation in 1998, the Company has amended and restated its certificate of incorporation twice, most recently on March 27, 2007. (*See* Ex. A to Walsh Aff., Certificate of Incorporation.) As amended and restated, the Certificate of Incorporation authorizes the issuance of Preferred Stock (Article Fourth) and further designates a series of such Preferred Stock known as Series A 6% Cumulative Convertible Preferred Stock (the "Series A Preferred Stock"). (*Id.* at Article Fourth, § 2(a).) Under Article Fourth, § 2(f)(iii), of the Certificate of Incorporation,

> [T]he holders of the Series A 6% Cumulative Preferred Stock shall have the exclusive and special right, voting separately as a class, to elect up to one (1) director of the Corporation (the "Series A

[5] One glaring omission from Austin's filings with this Court is a statement as to his total monetary investment in the Company. To Mr. Judy's knowledge, Austin has made no monetary investment in the Company, despite his purported ownership of 75% of the common stock. (Judy Aff. ¶ 10.)

> Director") at any annual meeting of the stockholders, at any special meeting of the stockholders called as herein provided or, if then permitted by the Certificate of Incorporation or Bylaws of the Corporation, by written consent in lieu of a meeting of stockholders. Such voting power shall continue to be vested in the holders of Series A 6% Cumulative Convertible Preferred Stock until 100,000 or less shares (or such greater or lesser number of shares as shall be outstanding with respect to such shares following any reclassification, subdivision or combination of such shares) of Series A 6% Cumulative Convertible Preferred Stock shall be issued and outstanding. During all periods in which such special voting power shall still be conferred upon holders of the Series A 6% Cumulative Convertible Preferred Stock, the Board shall consist of no less than four (4) and no more than nine (9) members.

(*Id.* at Article Fourth, § 2(f)(iii).)

Since 2007, greater than 100,000 shares of Series A Preferred Stock of the Company have been issued and outstanding. (Declaratory Judgment Compl. ¶ 24; Declaratory Judgment Answer ¶ 25.) Accordingly, the holders of the Series A Preferred Stock have had the right to elect a director to the Board.[6] As further provided by the above-quoted provisions of Article Fourth, under the present circumstances, the Board "shall consist of no less than four (4) and no more than nine (9) members." Currently, the Board has only one director—Austin. (Declaratory Judgment Answer ¶ 13, 17, 58.)

2. PCS Has Not Held An Annual Meeting

To Judy's knowledge, PCS has never held an annual meeting since it was incorporated more than ten (10) years ago. (Judy Aff. ¶ 5.) Whether or not such a meeting has ever been held, it is indisputable that no annual meeting of stockholders has been held in the past 13 months. (*Id.*) Austin has ignored the requests of Judy and other stockholders for an annual

[6] Austin admits the holders of Series A Preferred stock currently have the right to appoint a director to the Board. (*See* Declaratory Judgment Answer ¶¶ 71, 73.)

meeting of stockholders. (Judy Aff. ¶¶ 5, 8; Stockholder Aff. ¶ 1-2; Ex. F to Judy Aff., Stockholder Letters.)

3. The FCC Licenses And Proceedings

a. The FCC Licenses

The Company owns approximately 77 site-based Specialized Mobile Radio ("SMR") licenses (the "Site-Based Licenses")[7] in the U.S. Virgin Islands and Puerto Rico, which Site-Based Licenses were issued to the Company by the FCC. (Declaratory Judgment Compl. ¶ 6; Declaratory Judgment Answer ¶ 18.) Through its wholly owned subsidiary, PAI, the Company also owns 38 SMR economic area ("EA") licenses covering areas along the eastern seaboard, the western coast of California, Puerto Rico, and the U.S. Virgin Islands (the "EA Licenses" and together with the Site-Based Licenses, the "FCC Licenses"). (*Id.*) PAI obtained these EA Licenses in 2000, when it was made a successful bidder at the so-called Auction No. 34 conducted by the FCC. (*Id.*)

The FCC Licenses are potentially extremely valuable,[8] constitute substantially all of the Company's assets, and are the Company's main source of potential revenue. (Declaratory Judgment Compl. ¶ 6; Declaratory Judgment Answer ¶ 18; Ex. G to Judy Aff., Kagan Appraisal.) By Austin's own admission, the Company paid $32 million for the EA licenses alone. (Declaratory Judgment Answer ¶ 61.)

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[7] The Company originally owned 86 site-based SMR licenses, but Austin failed to renew 9 of them.

[8] Pursuant to an opinion by Kagan Media Appraisals ("Kagan"), attached as Exhibit G to Judy's Affidavit, Kagan concludes that the fair market value of the 800-900 MHz SMR spectrum licenses owned by the Company (as of October 24, 2005), is between $225.3 million and $153.6 million.

b. The FCC Proceedings

i. The "Rebanding" Proceeding

The Company's FCC Licenses, however, may be jeopardized by two proceedings that were initiated before the FCC. The first proceeding pertains to the FCC's rebanding of the 800 MHz band. The Company holds licenses in the 800 MHz band that are interleaved with emergency response frequencies, as do other companies such as Nextel Communications, Inc. ("Nextel"). (*See* Declaratory Judgment Compl. ¶¶ 7, 14.) The FCC prohibited licensees from creating harmful interference in the 800 MHz band; however, in-band interference occurred and gave rise to complaints from public safety authorities. (*See* Declaratory Judgment Compl. ¶¶ 8-9; Declaratory Judgment Answer ¶ 18.)

To remedy this concern, Nextel, in alliance with certain trade associations (which alliance became known as the "Consensus Parties"), made a proposal to the FCC that Nextel abandon its existing interleaved spectrum in the 800 MHz band and relocate its operations into a contiguous band of spectrum. (Declaratory Judgment Compl. ¶ 10; Declaratory Judgment Answer ¶ 18.) The FCC accepted Nextel's proposal and awarded it a nationwide license for 10 MHz of continuous radio spectrum in the 1.9 GHz band. (Declaratory Judgment Compl. ¶ 12; Declaratory Judgment Answer ¶ 18.) When the Company applied for the same right, it was denied on the basis that exclusive rights in the 1.9 GHz band were granted exclusively to other licensees, including Nextel. (Declaratory Judgment Compl. ¶ 13; Declaratory Judgment Answer ¶ 18.)

In July and December 2004, the FCC issued its decision on the matter through a series of orders (the "Rebanding Orders"). (*See* Declaratory Judgment Compl. ¶ 15; Declaratory Judgment Answer ¶ 18.) In response, the Company filed a Petition for Reconsideration with the FCC on December 22, 2004. (Declaratory Judgment Compl. ¶ 16; Declaratory Judgment

Answer ¶ 18.) In early 2006, the Company also filed a Petition for Review in the U.S. District Court of Appeals for the District of Columbia in an action styled *Preferred Communication Systems, Inc. v. Federal Communications Commission and the United States of America*, Case No. 06-1076 (the "District Court Action"), seeking reconsideration of the FCC's determination in the Rebanding Orders. (*Id.*) The FCC responded to the District Court Action by seeking to dismiss or delay such action. (*Id.*) The District Court Action remains pending subject to the outcome of the FCC Hearing.

ii. The FCC Enforcement Bureau Proceeding

In July 2007, a second proceeding was initiated by the FCC Enforcement Bureau, styled *In the Matter of Pendleton C. Waugh, Charles M. Austin, and Jay R. Bishop, Preferred Communication Systems, Inc., Preferred Acquisitions, Inc.*, E.B. Docket No. 07-147 (the "FCC Hearing"). (220 Compl. ¶ 7; 220 Answer ¶ 7.) The FCC Hearing relates to numerous issues, including, among other things (a) whether the principals of the Company and PAI (including Austin) made misrepresentations and/or lacked candor in its dealings with the FCC; (b) issues relating to certain stockholders' ownership interests in the Company, the outcome of which could affect Austin's purported control over the Company; (c) alleged transfers of control of certain licenses held by the Company without FCC approval; and (d) the qualifications of the Company, PAI, and their principals to be and remain FCC licensees. (*Id.*) A risk posed by the FCC Hearing is that it could result in the cancellation or revocation of the FCC Licenses. (Declaratory Judgment Answer ¶ 63.)

On March 11, 2009, the FCC Hearing was suspended while the parties sought to negotiate a settlement. (Declaratory Judgment Compl. ¶ 20.) Of great concern to Judy and other stockholders of PCS, the Company is not represented by counsel in the FCC Hearing. Rather,

Austin, who is himself an individual respondent in the FCC Hearing, purports to speak on behalf of the Company. Austin does not contend otherwise.

PSI—the stockholder group formed to preserve and protect the Company's interests and the investments of its members in the Company—sought to intervene in the FCC proceeding; to date, however, it has not been permitted to do so.[9]

C. Judy's Books And Records Demand

Concerned that Austin's handling of the FCC Hearing could cause the Company irreparable harm, and in light of increasing concerns of mismanagement of the Company, Judy, by letter dated May 29, 2009, made a written demand to inspect certain books and records of the Company and PAI, pursuant to 8 *Del. C.* § 220 (the "Demand"). (220 Compl. ¶ 11.)[10] The Demand stated Plaintiff's purposes for seeking such inspection: (a) to assist Plaintiff in communicating with other stockholders of the Company on matters relating to their interests in the Company; and (b) to assist Plaintiff in investigating possible mismanagement of the Company by the officers and directors of the Company, including, but not limited to, any mismanagement associated with a failure to protect or renew the Company's interests in the FCC Licenses. (Ex. A to 220 Compl., Demand.) The Company, through Austin, responded to the Demand by letter on June 5, 2009, and made a blanket and baseless rejection of all of Judy's requests. (*See* Ex. B to 220 Compl.) After the Demand was rejected by Austin in the name of

[9] PSI has even offered to contribute the funds necessary to pay the Company's license renewal fees to preserve certain of the FCC Licenses that would otherwise expire. (Declaratory Judgment Compl. ¶ 18.) Austin refused the offers, thereby precluding the Company from obtaining effective legal representation in connection with the FCC Hearing and subjecting certain of its licenses to possible expiration. (*See* Declaratory Judgment Compl. ¶ 18.) Separately, another investor group, Preferred Investor Association ("PIA"), sought to intervene on behalf of the Company and PAI, but this attempt was likewise opposed by Austin and the FCC. (Declaratory Judgment Compl. ¶ 18.)

[10] A true and correct copy of the Demand was filed as Exhibit A to the 220 Complaint. By way of background, this Demand is not the first time that Judy has requested inspection of books and records of the Company. For example, in November 2008, Judy requested certain books and records from the Company, but was not permitted access. (Judy Aff. ¶¶ 6-7.)

the Company, Judy filed the 220 Complaint, on June 12, 2009, seeking an order summarily requiring the Company to allow Plaintiff to inspect the same books and records requested in the Demand.

On July 8, 2009, Plaintiff filed the 211 Complaint seeking the Court to order the Company to convene an annual meeting pursuant to 8 *Del. C.* § 211. Concurrently with the filing of the 211 Complaint, on July 8, 2009, Plaintiff filed the Declaratory Judgment Complaint, seeking, among other things, a declaration that Austin does not have the authority to take corporate action on behalf of the Company, because the Board is not validly constituted under the Company's Certificate of Incorporation.

D. Developments Since Plaintiff Filed The Delaware Actions

On July 17, 2009, Judy (and others) filed a Motion for Limited Intervention ("Intervention Motion") in the FCC Hearing, seeking an abeyance of pending settlement negotiations until this Court could consider the pending summary matters. (Ex. C to Walsh Aff., Motion for Limited Intervention.)

In early August, 2009, Austin purported to enter into a settlement agreement by and among the Enforcement Bureau of the FCC, the Company, PAI, Austin, and Jay R. Bishop (the "Settlement Agreement"). (Ex. E to Walsh Aff., Notice of Filing (attaching Settlement Agreement).) The Settlement Agreement purports to, among other things, (a) require the Company to surrender certain of the FCC Licenses (listed on Attachment C thereof), which licenses constitute a substantial portion of all of the FCC Licenses; (b) require the company to make a "voluntary contribution" to the United States Treasury in the total amount of $100,000 (paid in installments)—essentially a fine to be paid by the Company; and (c) require the

Company to elect or appoint at least one additional director to the Company's Board and recruit a chief operating officer and chief financial officer for the Company and PAI. (*Id.*)[11]

On August 5, 2009, an Administrative Law Judge issued an order approving the terms of the Settlement Agreement (the "Approving Order"). (Ex. D to Walsh Aff., Order issued August 5, 2009; *see* Declaratory Judgment Answer ¶ 8.) On August 12, 2009, a Notice of Appeal of that Approving Order was filed by Pendleton C. Waugh ("Waugh"),[12] a party to the FCC Hearing, but who did not consent to the Settlement Agreement. (Ex. G to Walsh Aff., Notice of Appeal.) It is likely that the Waugh appeal acts to toll the period for the Approving Order to become final. (*See* Ex. E to Walsh Aff., Notice of Filing (attaching Settlement Agreement), ¶ 2(k).) In addition, an effect of the Approving Order was to render the Intervention Motion moot, and therefore, the parties who filed the Intervention Motion, including Judy, also appealed the Approving Order. (Ex. F to Walsh Aff., Appeal.)

On August 20, 2009, due to separate filings by Waugh in the FCC Hearing, stating essentially that he did not have an opportunity to be heard before the Settlement Agreement was entered, the Chief Administrative Law Judge in the FCC Hearing decided to hold the Approving Order in abeyance pending further order. (Ex. H to Walsh Aff., Order issued August 20, 2009.) The Chief ALJ also ordered the signatories to the Settlement Agreement to submit a factual statement to the FCC detailing the circumstances and occurrences leading up to the execution of the Settlement Agreement, particularly addressing whether Waugh was given an opportunity to participate in those negotiations. (*Id.*) Separately, in the order, the Chief ALJ

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[11] In requiring the Company to elect or appoint at least one (1) director and a COO and CFO (other than Austin), the FCC obviously also recognizes Austin's complete inability to properly and effectively manage the business and affairs of PCS.

[12] Plaintiff's counsel before this Court, Potter Anderson & Corroon LLP, does not represent Waugh. (Walsh Aff. ¶ 2.) Similarly, PSI's counsel in the FCC proceedings, Wilkinson Barker Knauer LLP, does not represent Waugh. (Judy Aff. ¶ 4.)

invited Judy to withdraw his appeal so that the FCC may reconsider the Intervention Motion. (*Id.*) On September 8, 2009, Judy filed a Withdrawal of Appeal and a Renewed Motion for Limited Intervention, which are pending. (Exs. J and K to Walsh Aff.)

Most recently, the Chief ALJ scheduled a conference for September 9, 2009, to discuss procedures for terminating the FCC Hearing as to all parties without a hearing, and to set a schedule of further pleadings, if needed. (Ex. I to Walsh Aff., Order issued September 4, 2009.) Judy understands that, during that hearing, the Chief ALJ requested the parties to reach a new settlement by September 21, 2009, or renew the proceedings, due to concerns raised regarding the Settlement Agreement. In either case, whether by settlement or full resolution of the proceedings, there is a substantial risk that certain or all of the Company's licenses will either be surrendered or revoked.

ARGUMENT

I. THE SUMMARY JUDGMENT STANDARD

Summary judgment will be granted to the moving party where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). "Once the moving party has demonstrated such facts, and those facts entitle it to summary judgment, the burden shifts to the non-moving party to present 'specific facts showing that there is a genuine issue of fact for trial.'" *Del-Chapel Assoc's. v. Conectiv*, 2008 Del. Ch. LEXIS 50, at *10 (Del. Ch.).[13] In meeting its burden of rebuttal, the non-moving party "may not rest upon mere allegations or denials." Ct. Ch. R. 56(e); *see also Del-Chapel Assoc's.*, 2008 Del. Ch. LEXIS 50, at *10; *accord XO Commc'ns, LLC v. Level 3 Commc'ns, Inc.*, 948 A.2d 1111, 1117 (Del. Ch. 2007). As demonstrated herein, there are no genuine issues of material fact as to any of Judy's three (3) claims for relief, and he is entitled to judgment in his favor as a matter of law.

II. PLAINTIFF IS ENTITLED TO INSPECT THE COMPANY'S BOOKS AND RECORDS

A. The Standard

Where a stockholder seeks inspection of books and records (other than the company's list of stockholders), the stockholder must establish that (1) he is a stockholder, (2) he has complied with Section 220's requirements as to the form and manner of the demand, and (3) the inspection is for a proper purpose. 8 *Del. C.* § 220(b). Where the stockholder seeks inspection of the stock ledger and related materials, and the stockholder has demonstrated that he is stockholder and has complied with the requirements as to the form and manner of the demand,

[13] A compendium of unreported decisions is filed herewith.

"the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose." 8 *Del. C.* § 220(c)(3).

B. Plaintiff Is A Stockholder And His Demand Complied With The Statute

Judy is a stockholder of record of the Corporation, as evidenced by the stock certificates provided to him. (Ex. A to Judy Aff.) Austin does not contest that Judy is a stockholder; rather, he asserts only that Plaintiff "holds less than one percent" of the shares. (Declaratory Judgment Answer ¶ 65.) Judy does not agree with that assertion; however, for present purposes, the percentage of shares owned by Judy is irrelevant. *See Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165, 176 n.27 (Del. Ch. 2002) ("The right to inspect and copy documents is not 'conditioned . . . on any minimum threshold investment on the part of the stockholder.'") (citations omitted).

In his 220 Answer, Austin, on behalf of the Company, also asserts that Judy's demand was not made in the proper form or manner because he "failed to provide documentary evidence of beneficial ownership of the stock . . . ." (220 Answer ¶ 45.) As noted, however, Judy is a stockholder of *record.* Accordingly, no documentary evidence of Plaintiff's beneficial ownership is required. *See* 8 *Del. C.* § 220(b).

Austin further asserts on behalf of the Company that Plaintiff failed to provide the requisite power of attorney or other writing that authorizes his attorneys to act on his behalf. (*See* 220 Answer ¶ 45.) Again, this "defense" misses the mark because Judy, not his attorneys, made the demand and thus no power of attorney is required. *See* 8 *Del. C.* § 220(b).

C. Plaintiff Has A Proper Purpose

Under Section 220, a proper purpose is "a purpose reasonably related to such person's interest as a stockholder." 8 *Del. C.* § 220(b). Judy stated a proper purpose in his

Demand, which made clear that he requested inspection of the Company's books and records to assist him "(1) in communicating with other stockholders of the Company and on matters relating to their interest in the Company and (2) in investigating possible mismanagement of the Company by the officers and directors of the Company . . . ." (Ex. A to 220 Compl.)

1. Investigating Possible Mismanagement

It is well settled that the investigation of possible mismanagement is a proper purpose under Section 220. *See Seinfeld v. Verizon Comm'cns, Inc.*, 909 A.2d 117 (Del. 2006); *Security First Corp. v. United States Die Casting & Dev. Co.*, 687 A.2d 563, 567 (Del. 1997); *Rales v. Blasband*, 634 A.2d 927 (Del. 1993). A stockholder seeking to investigate possible mismanagement is not obligated to prove the existence of wrongdoing to secure inspection of relevant books and records. *See Thomas & Betts Corp. v. Leviton Mfg. Co. Inc.*, 681 A.2d 1026, 1031 (Del. 1996); *Deephaven Risk Arb Trading, Ltd. v. Unitedglobalcom, Inc.*, 2004 Del. Ch. LEXIS 130, at *28 (Del. Ch.) (rejecting the argument that a stockholder seeking demand "had an obligation to identify specific actions of specific officials of the Company to meet its pleading burden"). Rather, a stockholder need only demonstrate some credible evidence of possible mismanagement sufficient to warrant further investigation to determine whether such activity is, in fact, taking place. *See Polygon Global Opportunities Master Fund v. West Corp.*, 2006 Del. Ch. LEXIS 179, at *9 (Del. Ch.). As the Delaware Supreme Court has explained:

> A stockholder is not required to prove by a preponderance of the evidence that the waste and mismanagement are actually occurring. Stockholders need only show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement that would warrant further investigation—a showing that may ultimately fall well short of demonstrating that anything wrong occurred. That threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing.

Seinfeld, 909 A.2d at 123 (internal citations, quotations, and brackets omitted).

Austin's mismanagement is practically self-evident; he has failed and/or refused even to retain competent counsel to represent the Company in this and other proceedings. He has completely insulated the Company from stockholders other than himself, refusing to provide stockholders even the most basic information about the Company's business, or providing them with proof of certain of their investments in the Company. (*See, e.g.* Judy Aff. ¶¶ 3, 6-7.) He has denied stockholders of their fundamental right to an annual meeting by refusing *ever* to convene such a meeting, even in the face of requests to do so. (Judy Aff. ¶ 5; Stockholder Aff. ¶ 2.; Ex. F to Judy Aff., Stockholder Letters.)

Judy also has reason to believe that Austin has also made inaccurate representations to the FCC and/or has failed to properly represent the Company before the FCC, thereby jeopardizing the Company's interests in certain of the FCC Licenses—the Company's most significant asset and main source of potential revenue. (Declaratory Judgment Compl. ¶ 19.) Austin has thwarted efforts by stockholder groups (including PSI) to provide the Company with effective legal representation in the FCC Hearing, and instead has sought to settle quickly the FCC Hearing on behalf of the Company on terms that many stockholders believe are highly unfavorable to the Company. (Declaratory Judgment Compl. ¶ 18.)

In short, Plaintiff has a credible basis to suspect that Austin is mismanaging the Company. Accordingly, Plaintiff has a proper purpose to inspect the Company's books and records.

2. Communicating With Other Stockholders Of The Company

It is also well-settled that where a stockholder makes a demand for a list of the Company's stockholders, the desire to communicate with other stockholders on matters relating

to their interests in the Company constitutes a proper purpose under Section 220. *Food & Allied Serv. Trades v. Wal-Mart Stores, Inc.*, 1992 Del. Ch. LEXIS 317, at *3 (Del. Ch.). A stockholder is not limited to communicating with other stockholders through management, but rather has "a right to go to stockholders directly, without procedural impediment if he desires to do so." *Kerkorian v. Western Airlines, Inc.*, 253 A.2d 221, 225 (Del. Ch. 1969), *aff'd*, 254 A.2d 240 (Del. 1969). Here, in advance of a meeting of stockholders, Judy seeks to obtain accurate information as to who the stockholders of PCS are, and to communicate with them about the state of the Company, the FCC proceedings, and its management. Simply put, by enlisting the support of other stockholders, Judy hopes to be able to keep afloat what is otherwise a sinking ship under Austin's control.

D. Plaintiff's Stated Purpose Is His True Proper Purpose

In addition to asserting that Judy lacks a proper purpose to justify his inspection of the Company's books and records, the 220 Answer discusses at length an alleged "multifaceted conspiracy" between Judy and a gentleman by the name of Pendleton Waugh. Plaintiff assumes that the Company has included these allegations in its 220 Answer to suggest that Judy's stated purposes is not his true proper purpose.

Judy has made substantial investments in the Company (to the tune of over $70,000). (Judy Aff. ¶ 2.) In filing the 220 Complaint, as well as the 211 Complaint and the Declaratory Judgment Complaint, Plaintiff wishes only to ensure that his investment in the Company is adequately protected and managed, and that his interests as a stockholder are honored and respected. Waugh does claim to be a shareholder of PCS, and is represented separately in the FCC proceedings by his own counsel. Waugh is not a party to this action and is not represented by the undersigned counsel. (Walsh Aff. ¶ 2.) To the extent Waugh has a

common interest with Judy in protecting his investment, there is nothing improper or illegal in their supporting each other's efforts to bring about change. As evidenced by the answers which Austin has filed in this case, he has nothing but disdain for stockholders other than himself, especially those who dare to challenge his authority. But that myopic view of the world does not defeat Judy's legitimate interest in obtaining information. At bottom, Austin has utterly failed to rebut Judy's proper purposes for the inspection.

E. The Requested Documents Are Necessary And Essential To Satisfy Plaintiff's Purposes And Plaintiff's Request Is Not Overly Broad

The documents that Plaintiff seeks relate to the ownership, governance, and business of the Company, and the scope of this request is reasonably narrow and specifically targeted at investigating potential instances of mismanagement that Plaintiff has discussed above. Indeed, the information requested includes only the information necessary to ensure that Austin is properly managing and keeping records of the Company, and not making business decisions to serve his own personal interests. The request is not, as Austin asserts, "overly broad and unreasonably burdensome."

Moreover, the requested documents are records that any properly run corporation should keep in the ordinary course of business, and the production of such documents should be of little burden to the Company. Nonetheless, if Defendants can demonstrate that the production of these documents would indeed be unreasonably burdensome, Judy is prepared to narrow his list of requested documents in a way that would still allow Plaintiff to adequately fulfill his proper purposes. However, for Judy to fulfill his immediate proper purposes (in view of the request for a meeting of stockholders), it is necessary and essential that he receive the following documents in advance of the annual meeting:

- A stock ledger and stock list of stockholders of the Company, including an indication as to (i) how many shares of stock are held by each stockholder

(voting or non-voting), (ii) the particular series or class of stock held by each stockholder, and (iii) each stockholders' address and other contact information recorded by the Company;

- A copy of the Bylaws of the Company as are currently in effect;
- A copy of all records of any and all voting trusts between stockholders of the Company; and
- Copies of all records of any and all options, warrants, or other securities or holdings that are exchangeable for voting stock in the Company, including an indication as to (i) how many instruments are held by each holder, (ii) the conditions under which such instruments may be convertible to voting stock and at what rate, and (iii) each instrument holder's address and other contact information recorded by the Company.

F. The Company's Privilege Defenses Do Not Circumvent Plaintiff's Right To Inspect The Company's Books And Records

In the 220 Answer, the Company asserts privilege or immunity-related defenses to Judy's request to inspect the Company's books and records. Surely, many (if not most) of the documents and information Judy seeks to inspect are not subject to any privilege or immunity. And, to the extent some documents are privileged, Judy is not requesting at this time that such documents be made available for inspection. So long as Austin is prepared to identify truly privileged documents on a privilege log, there is no need to produce such documents (although Judy reserves the right to contest any entries on the privilege log).

III. PLAINTIFF IS ENTITLED TO AN ORDER THAT THE COMPANY CONVENE AN ANNUAL MEETING OF STOCKHOLDERS

A. Plaintiff Has Established A Prima Facie Case Under Section 211

Section 211(c) of the DGCL provides relief to a stockholder who makes a *prima facie* showing that a meeting to elect directors has not been held for more than 13 months or has not been held within 30 days of the date originally designated for the annual meeting. *See Saxon Indus., Inc. v. NKFW Partners*, 488 A.2d 1298, 1301 (Del. 1984); *Tweedy, Browne, & Knapp v. Cambridge Fund, Inc.*, 318 A.2d 635 (Del. Ch. 1974). Once the stockholder has made such a

prima facie showing, this Court is empowered under Section 211 to summarily order a meeting of stockholders. 8 *Del. C.* § 211(c). Indeed, it has been held that "the right of a shareholder to compel an annual meeting under [Section] 211 may be virtually absolute." *Savin Bus. Machines Corp. v. Rapifax Corp.*, 375 A.2d 469, 472 (Del. Ch. 1977).

Plaintiff has been a stockholder of the Company since 1999, and to his knowledge, an annual meeting of stockholders of the Company has never been convened. (Judy Aff. ¶¶ 1, 5.) As such, Plaintiff has established a *prima facie* case under Section 211 of the DGCL and, therefore, respectfully requests the entry of an order compelling the Company to hold an annual meeting of stockholders.

In the 211 Answer "Defendant denies and/or contests the allegations that it . . . never held an annual meeting of stockholders," but, of course, does not state when (if ever) such a meeting occurred. (*See* 211 Answer ¶ 22.) Nevertheless, it is undisputed that no such meeting has been held in the past 13 months. (*See* 211 Answer.) Although Austin admits that there are (at least) 20 stockholders of the Company (Declaratory Judgment Answer ¶ 64),[14] according to Austin, the holding of an annual meeting would be meaningless because "Mr. Austin will elect individuals who support his position and efforts regarding the Company." (211 Answer ¶ 35.) On that basis, Austin states that "[t]his Court cannot (or should not) eradicate the authority of the current Board or otherwise supplant its judgment as to whether or not it is practical or prudent for the Company to conduct an annual meeting of its stockholders . . . ." (211 Answer ¶ 37(a).) Austin's arguments against the holding of an annual meeting are plainly without any legal basis.

[14] On information and belief, Plaintiff does not agree with Austin's assertion that there are only 20 stockholders of the Company, but instead there exists a far greater number of stockholders. For example, there are 17 stockholders of the Company alone that are members of PSI, the stockholder group of which Plaintiff is the President (Judy Aff. ¶ 4), and there are numerous stockholders who are not members of PSI. Therefore, Plaintiff has reason to believe that the total number of stockholders of Company is a far greater number.

Hoschett v. TSI Int'l Software Ltd, 683 A.2d 43, 45-46 (Del. Ch. 1996). ("[I]t is nevertheless a not unimportant feature of corporate governance that at a noticed annual meeting a form of discourse (i.e., oral reports, questions and answers and in rare instances proxy contests) among investors and between shareholders and managers is possible. The theory of the annual meeting includes the idea that a deliberative component of the meeting may occur.") Understandably, Austin wishes to avoid discourse among stockholders and questions directed to him about his regime, but that is fair game. Moreover, the stockholders have a right to convene and be heard and to elect directors of their choice.

B. This Court Has Discretion In Setting The Meeting Date

Once a stockholder has established a *prima facie* case under Section 211, the Court retains a measure of discretion in fixing the time, place, and conditions for such a meeting. 8 *Del. C.* § 211(c) ("The Court of Chancery may issue such orders [compelling an annual meeting] as may be appropriate, including, without limitation, orders designating the time and place of such meeting, the record date for determination of stockholders entitled to vote, and the form of notice of such meeting."); *see also McKesson Corp. v. Derdiger*, 793 A.2d 385, 392 n.21 (Del. Ch. 2002) ("The discretionary nature of § 211 with regard to whether, and when, to cause a corporation to hold an annual meeting is clear from its language . . . ."); *Shay v. Morlan Int'l, Inc.*, 1983 Del. Ch. LEXIS 405, at *5 (Del. Ch.) ("[C]ontrol of the time frame and conditions for the meeting lie within the discretion of this Court.").

Under the circumstances, Judy believes it is appropriate that the meeting be scheduled and proceed as follows:

i). Date: Judy requests that the meeting be scheduled on or about December 9, 2009.[15] This will allow for timely notice, as well as permit review of documents produced in response to Judy's demand, including the stock ledger.

ii). Notice: Judy requests that the Court approve the form of Notice of Annual Meeting of Stockholders of the Company, which is attached as Exhibit A to the proposed order filed herewith.

iii). Location: Judy requests that the meeting occur in Wilmington, Delaware, at a hotel or other neutral location.[16]

iv). Other conditions: Judy further requests that the Court appoint a master for the meeting to ensure that it will be conducted in accordance with proper protocols and procedures.[17]

IV. PLAINTIFF IS ENTITLED TO A DECLARATION THAT AUSTIN IS WITHOUT AUTHORITY TO ACT AS SOLE DIRECTOR OF THE COMPANY.

A. There Exists An Actual Controversy That Is Ripe For Judicial Determination

An actual controversy exists between Plaintiff, on the one hand, and the Company and Austin, on the other, and that controversy is ripe for judicial determination.[18] Austin claims

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[15] While Plaintiff would like an expeditious resolution to this matter, and under other circumstances would likely request that the Court order an annual meeting of stockholders be held at an earlier date, Plaintiff requests an annual meeting date of December 9, 2009, to allow sufficient time for Plaintiff to receive and review the requested books and records, to provide the stockholders with notice of the annual meeting, and to retain a Master to oversee the proceedings of the annual meeting.

[16] Counsel for Judy is prepared to make arrangements for the meeting to be held at the Hotel DuPont.

[17] Pursuant to Section 227 of the DGCL, the Court of Chancery is expressly empowered to appoint a master to hold any meeting ordered pursuant to Section 211, with such orders and powers as the Court deems proper. 8 *Del. C.* § 227(b). The PSI stockholder group is prepared to pay the reasonable attorney fees of a local corporate lawyer to serve as master of the Company's annual meeting.

[18] Delaware's Declaratory Judgment Act enables the Delaware courts to "declare rights, status and other legal relations whether or not further relief is or could be claimed." 10 *Del. C.* § 6501. For a declaratory judgment claim to be justiciable, there must be an "actual controversy," which means the controversy

that he is able to act alone on behalf of the Board and in the Company's name. Judy disagrees and further asserts that, since 2007, the Company has been without a properly constituted Board, because the holders of the Series A Preferred Stock have the right to appoint a director and the Board must consist of no less than four (4) directors. When Judy filed his Declaratory Judgment Complaint on July 8, 2009, he alleged that he had "reason to believe that the FCC EB and Austin, negotiating on behalf of PCS, are seeking a settlement that would require the Company to, *inter alia*, (a) sell certain of the FCC Licenses in Puerto Rico and the U.S. Virgin Island . . . at substantially less than fair market value . . . ." (Declaratory Judgment Compl. ¶ 20.) It was further alleged that "[t]he Company's loss of its rights to certain of the FCC Licenses would eliminate its main source of future revenue and drastically impair the value and future earning potential of the Company." (Declaratory Judgment Compl. ¶ 21.) To remedy such harm, Plaintiff sought, among other relief, a declaration "that the Board, with Austin as its sole director, is prohibited from taking any action on behalf of the Company or the stockholders, including entering into a settlement agreement with the FCC, until a special meeting of the stockholders is called in order to elect directors." (Declaratory Judgment Compl. ¶ 47(a).)

On August 6, 2009, Plaintiff's concerns were realized, when it was publicly announced that the FCC EB and Austin, in his own name and on behalf of the Company, entered into the Settlement Agreement (Ex. E to Walsh Aff., Notice of Filing (attaching Settlement Agreement)), the effects of which, as described above, could have dire consequences for the Company. Most recently, the Chief ALJ scheduled a conference for September 9, 2009, to discuss procedures for terminating the FCC Hearing as to all parties without a hearing, and to set

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must: (1) involve the rights or other legal relations of the party seeking declaratory relief; (2) involve a claim of right or other legal interest asserted against one who has an interest in contesting the claim; (3) be between parties whose interests are real and adverse; and (4) involve an issue that is ripe for judicial determination. *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 Del. Ch. LEXIS 182, at *22 (Del. Ch.) (citing *Rollins Int'l v. Int'l Hydronics Corp.*, 303 A.2d 660 (Del. 1973)).

a schedule of further pleadings, if needed. (Ex. I to Walsh Aff., Order issued September 4, 2009.) Judy understands that, during that hearing, the Chief ALJ requested the parties to reach a new settlement by September 21, 2009, or renew the proceedings, due to concerns raised regarding the Settlement Agreement. In either case, whether by settlement or full resolution of the proceedings, there is a substantial risk that certain or all of the Company's licenses will either be surrendered or revoked, without opportunity for a fully constituted Board to act on the Company's behalf in these proceedings. Accordingly, Judy seeks prompt declaratory relief (as described below) to address this situation and to obtain clarification of the Board composition for purpose of his request for an annual meeting of stockholders.

B. The Company's Certificate Of Incorporation And Delaware Law Make Clear That Austin Lacks Authority To Act On The Company's Behalf

On March 27, 2007, the Company's Certificate of Incorporation was amended to provide, at Article FOURTH, Section 2(f)(iii), that as long as greater than 100,000 shares of Series A Preferred Stock are issued and outstanding, the holders of the Series A Preferred Stock shall have the power to elect one director to the Board at any annual meeting. (Ex. A to Walsh Aff.) That section further provides that, so long as the holders of the Series A Preferred Stock have the right to elect a director, "the Board shall consist of no less than four (4) and no more than nine (9) members." (Ex. A to Walsh Aff.) There are currently greater than 100,000 shares of Series A Preferred Stock of the Company issued and outstanding (a fact that Austin does not contest), and there have been such sufficient number of shares since the amended Certificate of Incorporation was filed in 2007. (Declaratory Judgment Compl. ¶ 24; Declaratory Judgment Answer ¶ 25.)

As a consequence, since March 27, 2007, the Series A Preferred Stock have had the right to elect a director to the Board, and since that time, the Certificate of Incorporation has

mandated that the Board consist of at least four (4) directors. Austin acknowledges this fact: "In 2007, the Certificate of Incorporation was amended to provide for a BoD to be comprised of from four (4) to nine (9) members." (Declaratory Judgment Answer ¶ 67.) Nonetheless, since 2007, the Company has not held a annual meeting of the stockholders to elect these four (4) directors.

The indisputable facts demonstrate that there exists an actual controversy that is ripe for determination by this Court. That dispute and the rights of the parties can be decided by application of the unambiguous language in the Company's Certificate of Incorporation. Accordingly, it is appropriate for this Court to declare that: (1) Austin is currently without authority to act on behalf of the Board; and (2) for purposes of the annual meeting to be ordered by this Court, the Board shall consist of one (1) director appointed by the Series A Preferred Stockholders and three (3) appointed by the holders of the Company's common stock.[19]

[19] Austin's claim that he has authority to enter into the Settlement Agreement on the Company's behalf, without a validly elected Board, because he is an officer is without merit. Officers do not have authority to make such extraordinary business decisions (arising outside of the usual and regular course) without board approval. *See Int'l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 Del. Ch. LEXIS 59, at *28 (Del. Ch.) (holding that officer's decision to sell a substantial portion of the corporation's assets was extraordinary and thus required board approval). Here, without Board approval, Austin entered into the Settlement Agreement, which will result in the surrender of FCC Licenses that are critical to the Company. (Ex. E to Walsh Aff., Notice of Filing (attaching Settlement Agreement).) Further, Austin is conflicted in so surrendering the Company's assets, as he is an individual respondent in the FCC Hearing being settled.

CONCLUSION

For the reasons stated, plaintiff Michael Judy respectfully requests that this Court grant his Motion For Summary Judgment: (1) compelling the inspection of books and records under Section 220, (2) compelling an annual meeting of the stockholders under Section 211, and (3) declaring that Austin is without authority to act on behalf of the Board and that the Board of Directors should consist of one (1) director appointed by the Series A holders and three (3) directors appointed by the common stockholders.

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Dated: September 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2009, a copy of Brief in Support of Plaintiff's Consolidated Motion for Summary Judgment was served upon the following in the manner indicated:

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